Supreme Court, U.S.
FILED
AUG 4 1995
OFFICE OF THE CLERK

No. 94-8729

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN *ex rel.*
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to the Michigan Supreme Court

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
JOHN J. BYRNE
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026
Attorneys for Amicus Curiae

August 4, 1995

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

20 pp

QUESTION PRESENTED

Whether a Michigan nuisance abatement statute that permits the forfeiture of a person's property or interest in the property, if it is used in a proscribed manner by another person, even if the owner or other interested party, had no prior knowledge of the misuse of the property, did not consent to the misuse and had no capacity to prevent it violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. The Holding of the Supreme Court Below Should Be Reversed 10

II. The Michigan Supreme Court's Reference to the "Landmark" Forfeiture Decision in *Calero-Toledo* Neglects Recent Supreme Court Rulings Lessening the Broad Forfeiture Powers 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Austin v. United States, 113 S. Ct. 2810 (1993) 13

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 9, 12

Ricci v. Key Bancshares of Maine, Inc., 662 F. Supp. 1132 (D. Me. 1987) 8

United States v. A Parcel of Land, 113 S. Ct. 1126 (1993) 13

STATUTES:

M.C.L. 600.3801 et seq. 3

M.C.L. 600.3825(3) 3

LEGISLATIVE MATERIAL:

H.R. 1916 11

MISCELLANEOUS:

Cook, *Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting*, ABA Bank Compliance, Summer 1991 6

Page

Holmes, *History and Purpose of Arizona Forfeiture Under A.R.S. 13-4301* (1990) 9

Koch, Financial Crimes Rep. (Nat'l Assoc. of Atty's Gen.), *Adoptive Seizures and Judicial and Legislative Challenges to Jurisdiction*, Sept./Oct. 1993 . . . . . 4, 5, 9

Money Laundering: Needed Improvements for Reporting Suspecious Transactions Are Planned (GAO/GGD-95-156, May 30, 1995) 4

Pepe, *Uniform Law Comm. Approves Asset Forfeiture Amendments*, Money Laundering L. Rep. (Leader Publications, New York, N.Y.), vol. 5, no. 2, September 1994 8

Pilon, *Can Asset Forfeiture Law Be Justified*, N.Y.L. Sch. L. Rev. 313 (1994) 11

Sondak, *Further Limits on Forfeitures*, Money Laundering L. Rep. (Leader Publications, New York, N.Y.), vol. 3, no. 12, July 1993 8

Sondak, *Justices to Rule on Forfeiture of Innocent Owner's Property*, Money Laundering L. Rep. (Leader Publications, New York, N.Y.), vol. 5, no. 10, June 1995 2

Suspicious Transaction Reports (GAO/GGD-95-156, May 30, 1995) 6

Page

Uniform Controlled Substances Act (1994), Prefatory Note 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 94-8729

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN
EX REL. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to the
Michigan Supreme Court

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

The American Bankers Association hereby respectfully submits this brief as amicus curiae in support of the Petitioner, with consent of both the parties. The signed consents of each are filed together with this brief.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA" or "the Association") is the only national trade and professional association serving the entire banking community, from small community banks to large bank holding companies. ABA members represent approximately 90 percent of the commercial banking industry's total assets.

In the ordinary course of performing one of the core functions of the banking industry, lending money, commercial banks regularly acquire "interests" in property--mortgages on real property, liens on such things as automobiles and boats, and so forth--as collateral for loans made. In the event that such property ends up as the subject of a civil forfeiture, banks stand to lose their security interest in their collateral. Under the Michigan Supreme Court's ruling in this case, carried to its logical and inevitable conclusion and applied elsewhere to similar "abatement" statutes, our member banks would have no opportunity to oppose such a forfeiture or otherwise protect their interest as a matter or right, because many old state statutes fail to contain a complete "innocent owner" provision.[1]

---

[1] *See*, Robert M. Sondak, *Justices to Rule on Forfeiture of Innocent Owner's Property*, Money Laundering L. Rep. (Leader Publishers, New York, N.Y.), vol. 5, no. 10, June, 1995, at 5-6. The author points out that the *Bennis* case, if allowed to stand will be harmful to lenders because of the older federal laws and many state laws that do not provide innocent owner protection. Sondak states that "joint property owners, mortgagees, lessors and the like *who cannot control how others use their property* will be significantly affected by the outcome of this case." (emphasis added)

The ABA respectfully submits this brief to urge the Court to reverse the decision of the Michigan Supreme Court which ignored trends at the state and federal levels to include and expand the "innocent owner" defense under the civil forfeiture laws.

This case deals with the Wayne County Prosecutor's attempt to enforce a civil forfeiture under the Michigan nuisance abatement statute, M.C.L. 600.3801 et seq., of a car that was co-owned by the spouse of the petitioner and used by that spouse during the commission of an unlawful act of gross indecency. The petitioner asserts, with considerable plausibility, that she was ignorant of her husband's illegal use of the vehicle and did not condone it. The Michigan Supreme Court held that it is irrelevant whether that is so because there is no "innocent owner" defense in the statute. The petitioner's interest in the property can be forfeited whenever it is entrusted to another person who uses it illegally, regardless of whether the person entrusting the property has any culpability for the illegal act. While banks, as "lienholders," can have their liens repaid under the statute, it is only **after** an officer of the court deducts the expenses of keeping the property and the costs of the sale and paying all liens according to priorities, and even this is possible only if the lienor establishes that it had no notice that the property was being used or was to be used for the maintenance of a nuisance. M.C.L. 600.3825 (3)

Banks and other financial institutions recognize that the criminal and civil forfeiture laws serve a useful purpose in removing the profit from illegal activity. Our nation's bankers have been considered "partners" with law enforcement efforts to prevent financial institutions from unwittingly aiding individuals who break the law.[2] However, the state's assertion of sweeping authority to seize property rights of those who have done nothing wrong is frightening. This position forces legitimate businesses, such as financial institutions, to prove their lack of knowledge or awareness concerning borrower activities. In addition, this proof can only occur after the property is to be sold. This is unfair, particularly to commercial entities.

If the decision is left to stand, prosecutors and other government officials will quickly recognize that they can avoid the use of what law enforcement considers to be the more cumbersome forfeiture laws[3] by creative use of the

---

[2] According to a May, 1995 GAO Report, "Financial institutions are in a unique position to assist law enforcement at the federal and state levels by reporting suspicious transactions that might indicate money laundering." *Money Laundering: Needed Improvements for Reporting Suspicious Transactions Are Planned* (GAO/GGD-95-156, May 30, 1995), at 36.

[3] Clearly, prosecutors are searching for ways to stem the tide of state laws that "curtail" civil asset forfeiture. In the September/October 1993 issue of Financial Crimes Report published by the National Association of Attorneys General, the then Supervising Deputy Attorney General for the California Asset Forfeiture Program bemoaned the

more arcane statutes such as the Michigan nuisance abatement law. Thus, the law enforcement authorities who have been losing some of their forfeiture authority at the state and federal levels will avoid those "obstacles" by using obscure statutes that do not contain a clear innocent owner defense. Such a strategy avoids the requirement now present in many modern state forfeiture laws that protection for innocent parties be considered prior to the government "taking" of one's interest in property. Financial institutions will be prevented from having their day in court to protect their property prior to sale if this decision is not reversed.

If this effort is allowed to succeed, financial

---

problems facing prosecutors who were losing the broad powers of the forfeiture laws and advocated the use of "adoptive seizures," a process by which the states use a federal forfeiture law instead of the state law. The author gives this rationale:

> Recent media coverage about civil asset forfeiture presents a serious challenge to both state and federal civil drug asset forfeiture statutes. Whereas the challenge to the federal statutes is in its infancy, the attack on state statutes has matured into a serious threat to the continued viability of state asset forfeiture. Jeffrey J. Koch, *Adoptive Seizures and Judicial and Legislative Challenges to Jurisdiction*, Financial Crimes Rep. (Nat'l Assoc. of Atty's Gen.) Sept./Oct. 1993, at 7.

institutions will restrict the flow of credit or other banking transactions to individuals when there is even the slightest suspicion of illegal activity. More importantly, this implied duty to investigate a customer's background far beyond the basic charge to perform a credit check will result in a huge increase of credit costs for all of our potential borrowers including those least able to absorb additional costs. Our nation's banks, who are in the front line of establishing programs to "know your customer"[4] and have been commended by the government for these efforts, will never be able to rely on their deterrence programs again, if the decision is allowed to stand. So long as there exists even the remote possibility that an institution may lose the value of its loan or collateral on a piece of property because the government has argued that the property was used to facilitate a crime by another individual, the financial institution will have to substantially limit its business activities.

As far as increased costs, in order to comply with the theory under Michigan's law that a lienor not have "notice" that the seized property was being improperly used, banks would not be protected by simply performing an inquiry of a borrower's creditworthiness. Instead, financial institutions would be charged with an ongoing duty of inspecting property and determining if the use was proper. This duty

---

[4] *See Suspicious Transaction Reports* (GAO/GCD-95-156, May 30, 1995 at 12 and Cliff E. Cook, *Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting*, ABA Bank Compliance, Summer 1991, at 7.

to investigate is difficult for seasoned law enforcement officials, let alone commercial bankers. Even if an institution carries out this requirement, the consumer will be harmed. Having bankers determine the legitimate use of collateral will result in increases in processing time for all lending transactions, spiraling loan costs and the aforementioned restriction of credit. These problems can become more pronounced in residential mortgage financing which must be handled in a timely manner due to volume and for loans to small businesses who are always the first harmed when credit is tightened. This result will hamper both domestic and international commerce and is simply not justified.

No prudent lender can rest knowing that the potential exists that the property supporting a loan transaction may be seized and its value lost. America's banks are implementing strong procedures to identify their customers to determine whether illegal activity has occurred. If any bank makes a good-faith determination that a customer is honest and a good credit risk, the government should not be able to come in and seize the collateral for a loan without allowing the use of the innocent owner defense. Fairness requires no less.

Additional problems will exist for lenders if the government prevails. Lenders who refuse to make loans collateralized by property for fear of a forfeiture run a risk of violating their duty to the customer. A lender's effort to investigate prospective borrowers could conflict with its efforts to comply with the anti-discrimination laws or could

subject it to defamation claims.[5]

The Association believes that the decision of the Michigan Supreme Court must be reversed and that an innocent owner defense must be made available as a matter of constitutional right in any statute that authorizes forfeitures. While the banking industry is hopeful that the model Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Law and containing clear protection for innocent owners and lienors, will be adopted by many states, there are still many state statutes that authorize seizure and forfeiture of property that will not be affected. Therefore, leaving this decision intact will have a major impact throughout the country.

SUMMARY OF THE ARGUMENT

In response to the scope and breadth of the asset forfeiture laws, Congress, the courts, and various states have begun sharply to limit the government's power to seize assets.[6] This momentous shift toward protecting innocent

---

[5] See *Ricci v. Key Bancshares of Maine, Inc.*, 662 F. Supp. 1132 (D. Me. 1987) (upholding of $15,000,000 punitive damage award against a bank for terminating a customer's line of credit based on an incorrect tip from the FBI).

[6] *See* Robert M. Sondak, *Further Limits on Forfeitures*, Money Laundering L. Rep. (Leader Publications, New York, N.Y.), vol. 3, no. 12, July, 1993 and Raymond P. Pepe, *Uniform Law Comm. Approves Asset Forfeiture Amendments*, Money Laundering L. Rep. (Leader

owners is in stark contrast to what the Michigan Supreme Court is allowing to transpire--circumvention of these recently enacted forfeiture statutes by prosecutors who utilize arcane laws that do not reflect the fairness of the new limits on forfeiture authority. Permitting the use of statutes such as the Michigan abatement law will only succeed in fulfilling the mission of what prosecutors have called "'social engineering' accomplished through government intercession in commercial activity harmful to the economy as a whole."[7]

The Michigan Supreme Court committed a grievous error by relying on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), for the proposition that there can be no innocent owner defense without specific reference in the statute. There have been several cases that have succeeded in expanding the protection for innocent owners and these developments have been neglected by the Michigan Court. Our brief argues that this decision cannot be left to stand because it will only succeed in punishing the innocent by taking real and personal property from those who have had nothing to do with the underlying offense.

Publications, New York, N.Y.), vol. 5, no. 2, September, 1994. Also, California Deputy Attorney General Jeffrey Koch announced that "the attack on state [forfeiture] statutes has matured into a serious threat to the continued viability of state asset forfeiture." Financial Crimes Report, at 7.

[7] Holmes, *History and Purpose of Arizona Forfeiture Under A.R.S. 13-4301*, at 1 (1990), reprinted in ABA National Institute on Forfeitures and Asset Freezes (1990).

ARGUMENT

I. The Holding of the Supreme Court Below Should Be Reversed.

It is contrary to the stated goals of Congress and the state governments under all of the recent forfeiture laws to fail to consider the innocence of the owner of property that has been seized and forfeited. In fact, in the prefatory note to the draft Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, the authors state that:

> the wide-spread acceptance of such statutory defenses [innocent owner] illustrates the acceptance of the more general proposition that citizens ought not to be subject to the unconstrained power of government officials, no matter how appropriately most of the officials would discharge their responsibilities. Given the extent to which commercial interests can be implicated by modern forfeitures, statutory protection of the interests of innocent owners is required because in typical commercial transactions, due diligence cannot be satisfied by reliance upon expectations regarding prosecutorial discretion.[8]

---

[8] In fact, the Uniform Law Commissioners specifically reject the approach of allowing forfeiture if the owner was "merely negligent respecting how their property would be used. Instead, the Act subjects an owner's interest to forfeiture only when the owner was willfully blind respecting how their property would be used." Uniform Controlled Substances Act (1994), 4-5 (Prefatory Note).

The Commissioners felt so strongly about protecting innocent owners that they stressed that the Uniform Act requires that the state "proceed diligently with forfeiture proceedings" because the intent behind the model law was to ensure that innocent owners not "suffer the restraint of their property indefinitely, and the simple fact that the State has proceeded against property will interfere with marketability no longer than necessary." Prefatory Note for Uniform Controlled Substances Act (1994), drafted by the National Conference of Commissioners on Uniform State Laws, p. 3.

On the federal level, the Chairman of the House Judiciary Committee has reintroduced H.R. 1916, the "Civil Asset Forfeiture Reform Act," to "completely overhaul asset forfeiture law and restore basic constitutional guarantees such as due process, the presumption of innocence, and the right to own and enjoy private property."[9]

---

[9] *See* Cato Institute book release "Government's forfeiture powers should be reined in, Chairman Hyde says in new Cato book." Cato Institute, News Release: Book Release (D.C.), June 22, 1995. *See also* a 1994 law review article, Roger Pilon, *Can Asset Forfeiture Law Be Justified*, N.Y.L. Sch. L. Rev. 313, 311-333 (1994) argues that due to the "manifest injustice" in having the property seized but the rights of the owner never coming into consideration "Congress and several states in the 1980's enacted innocent

II. The Michigan Supreme Court's Reference to the "Landmark" Forfeiture Decision in *Calero-Toledo* Neglects Recent Supreme Court Rulings Lessening the Broad Forfeiture Powers.

The Michigan Supreme Court, addressing the issue of the historic treatment of not affording innocent owners any consideration in a forfeiture proceeding cites the 1974 case *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), which rejected the asserted innocence of a property owner as a defense in that case. However, even this case shows a reluctance to ignore completely an owner's innocence:

> [i]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent...Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Calero-Toledo v. Pearson Yacht Leasing Co., at 689-90.

---

owner defenses."

(emphasis added).

In other words, if an innocent owner defense is not provided for in the statute, as in this case, one would have to be created. The Constitution demands it.

Also, in *Austin v. United States*, 509 U.S. ___, 113 S. Ct. 2801 (1993), a decision that addressed whether civil forfeiture is subject to the excessive fines clause, this Court again limited the scope of the civil forfeiture laws and ruled that "forfeiture serves at least in part to punish the owner." *Id.*, 509 U.S. at ___, 113 S. Ct. at 2810. Therefore, innocent owners must be given an opportunity to avoid punishment that occurs when the government seizes and abates one's vehicle.

Finally, in another 1993 case in which the ABA participated as amicus curiae,[10] this court expanded the "innocent owner" provisions under federal forfeiture law beyond bona fide purchasers for value and allowed donees access to the statutory defense as well.

CONCLUSION

There has been an unmistakable movement in the courts and the state and federal legislatures against expanding the government's forfeiture powers. While the Association respects and supports efforts to seize the properties of criminals used by them to advance illegal activity, the

---

[10] *United States v. A Parcel of Land*, 113 S. Ct. 1126 (1993).

problem of relieving innocent owners, such as lenders, of the unintended effects of these laws needs to be addressed. For these reasons, the American Bankers Association, as amicus curiae, urges this court to reverse the decision of the Michigan Supreme Court.

Respectfully submitted,

John J. Gill III
Counsel of Record
Michael F. Crotty
John J. Byrne
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 663-5026
Attorneys for Amicus Curiae

August 4, 1995